

CARRIAGE OF PASSENGERS AND THEIR LUGGAGE BY SEA

Discussion
Paper

THE ATHENS CONVENTION

November 2017

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Definitions

1974 Convention	<i>Athens Convention relating to the Carriage of Passengers and their Luggage by Sea 1974</i>
2002 Protocol	<i>Protocol of 2002 to the Athens Convention relating to the Carriage of Passengers and their Luggage by Sea, 1974</i>
ACCC	Australian Competition and Consumer Commission
ACL	<i>Australian Consumer Law</i> , found in Schedule 2 to the <i>Australian Competition and Consumer Act 2010</i>
Athens Convention	<i>Athens Convention relating to the Carriage of Passengers and their Luggage by Sea 1974</i> , as amended by the 2002 Protocol
Carrier	Under the Athens Convention, a person by or on behalf of whom a contract of carriage has been concluded, whether the carriage is actually performed by that person or by a Performing Carrier. In the context of this paper, Carrier and Shipowner are used interchangeably
Claimant	A person who makes a claim or asserts a right or an interest against a Shipowner or Carrier. In the context of this paper, claimant and passenger are used interchangeably
Convention	Depending on the context, the Athens Convention or the LLMC Convention
Carrier who actually performs the whole or part of the carriage	Under the Athens Convention, person other than the Carrier, being the owner, charterer or operator of a ship, who actually performs the whole or part of the carriage
Contract of Carriage	Under the Athens Convention, a contract made by or on behalf of a Carrier for the carriage by sea of a passenger and his luggage, as the case may be
Infrastructure	Department of Infrastructure and Regional Development
International Carriage	Under the Athens Convention, any carriage in which, according to the contract of carriage, the place of departure and the place of destination are situated in two different States, or in a single State if, according to the contract of carriage or scheduled itinerary, there is an intermediate port of call in another State
LLMC Act	<i>Limitation of Liability for Maritime Claims Act 1989</i>
LLMC Convention	<i>Convention on Limitation of Liability for Maritime Claims 1976</i> , as amended by the 1996 Protocol
Member State	A nation that is a party to the Convention
Passenger	Any person carried on a ship under a contract of carriage; in the context of this paper, a 'passenger' is also referred to as a 'claimant'
Performing Carrier	Under the Athens Convention, a person other than the Carrier, being the owner, charterer or operator of a ship, who actually performs the whole or a part of the carriage
Ship	Under the Athens Convention, a sea going vessel, excluding an air-cushion vehicle

Shipowner	The owner, charterer, manager and operator of a seagoing ship under the LLMC Convention. In the context of this paper, Shipowner and Carrier are used interchangeably
Shipping Incident	Shipwreck, capsizing, collision or stranding of the ship, explosion or fire in the ship, or defect in the ship
SDR	Special Drawing Right (SDR) is an international reserve asset created by the International Monetary Fund to supplement its member countries' official reserves. As at 26 October 2017, 1 SDR was worth around AU\$1.80

1. Introduction

1.1 Purpose

The Department of Infrastructure and Regional Development (Infrastructure) is conducting a consultation process on Australia's possible ratification of the *Athens Convention relating to the Carriage of Passengers and their Luggage by Sea 1974*, as amended by the 2002 Protocol (Athens Convention).

The purpose of the consultation process is to determine the adequacy of the current legal framework regarding the international carriage of passengers by sea and, in particular, the compensation and liability regime for these passengers. Additionally, Infrastructure is seeking views on the commercial implications if Australia were to ratify the Athens Convention. These views will assist the Australian Government in its consideration of whether ratification of the Athens Convention is necessary.

1.2 Overview

The Australian cruise ship industry is a growing industry. The last decade has seen a period of strong growth with Australian cruise passenger numbers increasing by an average of 19.4 per cent per year since 2007. In 2016, the Australian cruise industry experienced the largest annual rise in passenger numbers on record with an increase of 21 per cent, to over 1.2 million passengers.¹

With this growth, there is a need to ensure that Australian passengers and shipping Carriers are provided with the same level of rights and protections as their international counterparts. The Athens Convention seeks to implement a regime for assigning liability in international passenger shipping that provides passengers and Carriers with greater legal certainty. It also provides defined options to resolve legal claims arising from shipping accidents that are arguably simpler and more extensive than those currently available under Australian law.

¹ Cruise Lines International Association Australasia – Cruise Industry Market Report – Ocean Cruise Passengers Australia 2016, pp 4-5

1.3 Consultation

The Australian Government encourages ship passengers and their representative organisations; industry participants, including passenger ship operators, passenger ship owners, travel and ship insurers; and other stakeholders to consider the issues set out in this discussion paper and make a submission. A full list of questions posed in this discussion paper is at **Appendix A**.

Infrastructure is seeking written submissions on the issues raised in this discussion paper **no later than 31 January 2018**. Submissions will only be treated as confidential if they are expressly stated to be confidential.

Infrastructure prefers to receive electronic copies of submissions, in either PDF or Microsoft Word format. Please email submissions to:

athensconvention@infrastructure.gov.au

Alternatively, submissions can be posted to:

Athens Consultation
Maritime and Shipping Branch
Department of Infrastructure and Regional Development
GPO Box 594
CANBERRA CITY ACT 2601

1.4 Paper Structure

Section 2	Outlines the current legal framework and compensation and liability regime for Australian and internationally bound passengers travelling by sea
Section 3	Outlines the Athens Convention passenger liability regime
Section 4	Sets out the issues with the current framework in Australia
Section 5	Discusses the potential options for reform
Appendix A	Outlines key questions for consideration

2. The Current Legal Framework

2.1. Australia

The *Australian Consumer Law* (ACL) is a national law for fair trading and consumer protection that has been adopted uniformly by the state and territory governments and commenced on 1 January 2011. The ACL is contained in Schedule 2 to the *Competition and Consumer Act 2010*.

The ACL creates a basic set of guarantees for consumers who acquire goods and services (such as passenger cruises) from a service provider or Carrier in circumstances where there is a relevant connection to Australia. These guarantees, where they apply, cannot be excluded by contract (and any clauses that purport to do so are invalid).

Consumers are able to claim a remedy from the supplier where the service does not meet a statutory consumer guarantee. Specifically, section 60 provides a basic guarantee that service providers carry out all services using an acceptable level of care and skill. In circumstances where this has not occurred, the ACL provides the consumer with a range of remedies. The consumer can seek to recover the amount of the loss or damage caused by the conduct of the supplier (or other relevant person involved in the contravention) under section 236 and, in some cases, the consumer will be entitled to compensation for damages and loss under section 237.

The ACL is administered and enforced jointly by the Australian Competition and Consumer Commission (ACCC) and state and territory consumer protection agencies.

In addition to the protections conferred under the ACL, consumers are also able to pursue claims for damages in respect of harm resulting from the fault of a person, in actions based in negligence, contract or other causes of action under common law (as modified by state and territory Civil Liability Acts, which each modify essential elements of the action (e.g. limitation periods, statutory defences, etc.) differently).

The Civil Liability Acts operate alongside the ACL and other statutes.

Comprehensive discussion of the operation of the Civil Liability Acts and their interaction with the ACL is beyond the scope of this paper.

Further Information on the Australian Consumer Law

Further information can be found at the following Australian Government websites:

- The Australian Consumer Law consumerlaw.gov.au
- The ACCC accc.gov.au
- The Department of the Treasury treasury.gov.au/consumers

Additionally, the relevant state and territory consumer protection agencies can also be contacted for additional information on the ACL.

2.2 International

2.2.1 Convention on Limitation of Liability for Maritime Claims

The *Convention on Limitation of Liability for Maritime Claims 1976*²

(LLMC Convention) allows Shipowners to limit their total liability for claims arising out of one single event, referred to as ‘global limitation’.

The LLMC Convention applies to claims for loss of life and personal injury, as well as loss of or damage to property. Australia is a party to the LLMC Convention, which is implemented in Australia by the *Limitation of Liability for Maritime Claims Act 1989* (LLMC Act).

Carriers are able to limit their liability under the LLMC Convention, unless it is proven that the loss occurred due to an intentional act or omission, or that the Carrier acted recklessly with the knowledge that such damage would probably occur. Liability limits are specified in respect of claims for loss of life or personal injury, and property claims (such as damage to other ships).

The liability limit for the loss of life or personal injury to passengers of a ship is calculated based on the size of the ship and the number of passengers which the ship is authorised to carry (not the actual number of passengers carried). The overall passenger limit is 175,000 Special Drawing Rights (SDR) multiplied by the ship’s certified capacity. For example, a ship with capacity of 1,000 passengers

² *Convention on Limitation of Liability for Maritime Claims, 1976*, done at London on 19 November 1976, as amended by the 1996 Protocol

would have a 175,000,000 SDR liability limit (AU\$319,421,172 as at 26 October 2017).

Article 15 of the LLMC Convention provides state parties with the flexibility to set a higher maximum Carrier liability limit (up to unlimited liability) in respect of claims for loss of life or personal injury to passengers. Australia has implemented the liability limit set by the LLMC Convention through the LLMC Act. Nevertheless, if Australia wished to increase the maximum Carrier liability limit for such claims to be higher than the limit prescribed under the LLMC Convention, it could do so by amending the LLMC Act (and notifying the Secretary-General of the International Maritime Organisation). The LLMC Convention does not impose strict liability to pay compensation for damage on the Shipowner, which means the obligation to prove the claim is on the claimant. The amount of compensation that a court is able to award is limited by the LLMC Convention.

There is no requirement for Shipowners to gain and maintain insurance in the LLMC Convention and there is no avenue for passengers to sue insurers directly.

3. The Athens Convention

The Athens Convention sets out an international regime of Carrier liability for damage suffered by passengers, (or where luggage has been lost or damaged), on board ships engaged on international voyages. The Athens Convention applies to any international carriage where the contract is made, or the place of departure or destination, or the ship's flag or registration is, in a state that is party to the convention (Member State).

The Athens Convention was initially adopted in 1974 but has been extensively updated since, most significantly by the 2002 Protocol.

The key features of the Athens Convention are:

- (1) Carriers and Performing Carriers are required to maintain insurance or other financial security to cover death or personal injury for a maximum amount of 250,000 SDR per passenger (approximately AU\$456,315, as at 26 October 2017).
- (2) Claimants have the right to recover directly from the ship's insurer or others providing the financial security.
- (3) Carriers are subject to a two-tier liability system for claims involving personal injury to and death of passengers:
 - (a) Carriers are strictly liable up to 250,000 SDR for personal injury and death claims arising out of shipping-related incidents, unless the Carrier can prove that the loss was caused solely by an act of war, natural phenomenon, or the act of a third party; and
 - (b) where the Carrier is liable for death or personal injury to a passenger caused by a shipping incident and the liability exceeds this amount, the Carrier is further liable to an overall liability limit of 400,000 SDR (approximately AU\$730,106) unless the Carrier proves that the incident occurred without the fault or neglect of the Carrier.
- (4) Carriers are not strictly liable for claims that do not arise out of shipping incidents (such as slips, trips and falls) and Claimants must prove that the Carrier was at fault.

- (5) Carriers are liable for the loss of or damage to luggage and vehicles up to the following limits:
- (a) 2,250 SDR (approximately AU\$4,107) per passenger for cabin luggage;
 - (b) 12,700 SDRs per vehicle (approximately AU\$23,181) for vehicles including all luggage carried in or on the vehicle; and
 - (c) 3,375 SDRs (approximately AU\$6,160) per passenger for ‘other luggage’.
- Additionally, the carrier and the passenger may agree to set higher liability limits; or agree to deduct the Carrier’s liability from the compensation amount.³ However, under this arrangement, the deductible component of the payment cannot exceed:
- (a) 330 SDRs (approximately AU\$620) for damage to a vehicle; and
 - (b) 149 SDRs (approximately AU\$272) per passenger for ‘other luggage’.
- (6) Claimants have a two year time limit to make a claim for death, personal injury or damage to luggage. This time limit can be extended to a maximum of five years under certain circumstances.
- (7) Parties to the Convention are able to provide a higher limitation of liability limit (including unlimited liability) for claims involving the death of or personal injury to a passenger when implementing the Athens Convention in domestic legislation.
- (8) Claimants are offered a choice of jurisdiction in which to bring their claim – provided the court is located in a jurisdiction that is a party to the Athens Convention which is either the permanent residence or principal place of business of the defendant; the claimant’s state of domicile or permanent residence; the place of departure or destination; or the place where the Contract of Carriage was made.
- (9) Any contractual provisions entered into before the incident that attempt to restrict, limit or exempt the Carrier from liability, or shift the burden of proof contrary to the Convention, or restrict the Claimant’s choice of jurisdiction in which to bring a claim, are null and void.

³Note, under this arrangement, the deductible component of the payment cannot exceed 330 SDRs (approximately AU\$620) for damage to a vehicle and 149 SDRs (approximately AU\$272) per passenger for ‘other luggage’.

A significant number of nations have already ratified the Athens Convention. As at 11 October 2017, 28 Member States were a party to the 2002 Protocol including the United Kingdom, and major flag states Panama and the Marshall Islands. There are also a number of nations that are a party to the 1974 Convention but have not ratified the 2002 Protocol, for example Barbados, China and Poland.

While the Athens Convention has entered into force internationally, Australia is not a party to it.

4. Issues with the current framework in Australia

4.1 The Case for Change

The current legal framework in Australia for the international carriage of passengers on ships is complex and can be uncertain for both passengers and Carriers. As outlined above, in the Australian context, passengers may bring a claim against the Carrier under the ACL or for breach of contract or for negligence.

Some of the issues that Australian passengers may face under the current framework include:

- (1) Bringing an action in an Australian court: in many cases, the passenger's contract will contain an exclusive jurisdiction clause that specifies the nation that a claim may be brought, which is often not Australia.
- (2) Choice of law: similar to the above, while the passenger may physically purchase a ticket for a cruise in Australia, the cruise terms may say the contract is subject to the laws of a foreign nation. If the claimant does not challenge this issue (at their own cost through litigation), or if they are unsuccessful and the court determines the appropriate law is the foreign law, the claimant may be entitled to less (if any) compensation than the claimant would have otherwise been entitled to under Australian law.
- (3) How liability is to be proven: if the matter is heard in Australia or in a nation that is not a Member State to the Athens Convention, the Claimant would need to prove the Carrier's fault or negligence for shipping-related incidents causing personal injury or death.
- (4) How much can be recovered: there are no defined limits to compensation that passengers can claim, which can cause uncertainty. The outcome will be subject to the laws in the nation or the Australian state/territory where the claim is heard. This also exposes Carriers and their insurance companies to a great deal of uncertainty.
- (5) The ability to recover payment: As there is no compulsory requirement for ships to have insurance for passenger claims, or a legal presence in Australia, passengers are potentially exposed to the risk of a Carrier not being able to pay compensation (or avoiding payment), even if a claim is successful, as the

compensation may exceed the Carrier's assets (the Carrier may be a 'one ship company' or have assets in another country). Further, even if the Carrier has insurance, passengers are not able to sue the insurer directly, and thus may not have access to insurance funds (especially where the insurer only reimburses the Carrier after (and only to the extent that) the Carrier makes a payment in response to a claim).

4.2 Air Carriers' Liability and Insurance

Presently, there is an inconsistency between the rights available to passengers travelling by air compared to passengers travelling by sea.

The rights of Australian passengers engaging in international travel by air are mainly governed by the *Convention for the Unification of Certain Rules for International Carriage by Air 1999* (Montreal Convention), which is given force of law in Australia by the *Civil Aviation (Carriers' Liability) Act 1959* (CACL Act). Amongst other things, the Montreal Convention governs the liability of an airline for the death or injury of an Australian passenger on an airline flight.

Significantly, the Montreal Convention establishes unlimited liability and features a two-tier system of liability.

- (1) Applicants are able to claim up to 113,100 SDR on a strict liability basis (i.e. no requirement to prove fault, only that the injury was incurred).
- (2) Damages above the 113,100 SDR threshold are available to the claimant unless the air carrier is able to prove that the damage was not caused by the negligence or other wrongful act or omission of the carrier, its servants or agents.

The Montreal Convention requires airlines to have compulsory passenger insurance to ensure that money is available to provide compensation to air passengers in the event of an accident, matching the amount of mandatory insurance with the cap on liability. Australia currently requires international carriers to purchase 260,000 SDR (approximately AU\$476,989)⁴ per passenger, to cover their potential liabilities under

⁴ 260,000 SDR = AU\$476,989) as at 26 October 2017

the Montreal Convention. However, unlike the Athens Convention, there is no provision for passengers to make a claim directly against the insurer.

5. Options for reform

5.1 Ratification of the Athens Convention

If the Australian Government decided to ratify the Athens Convention, the rights of Australian cruise passengers would be brought into line with those enjoyed by many of our international counterparts and most air passengers on international services. Australia's ratification of the Athens Convention would mean that:

- (1) Claimants would be able to sue the Carrier who sells the cruise and/or the Carrier who performs the cruise.
- (2) Carriers would need to have the required levels of insurance for international carriage of passengers to and from Australia.
- (3) Claimants would be able to sue the Carrier or the Performing Carrier's insurer directly, which would ensure there is always a clear defendant to any claim.
- (4) Claimants would have certainty over the level of compensation that they are entitled to claim. Carriers would be subject to strict liability for claims arising out of shipping incidents, and up to specified amounts; for such claims, the claimant would not need to prove fault or negligence. This would likely have the effect of claimants not needing to pursue costly and lengthy litigation proceedings (and may result in greater willingness on the part of Carriers to settle outside court).
- (5) Claimants would, in most cases, be able to choose in which jurisdiction their claim is to be heard. Australian claimants would be able to sue in an Australian court (if the origin/destination of the cruise is in Australia or the defendant has a place of business in Australia), and such judgments will be enforceable in the courts of all Member States.
- (6) Claims would be subject to a two-year time limit, providing certainty to passengers and Carriers. However, this is shorter than most limitation periods in Australian states and territories for contract or tort/negligence claims and is shorter than the six-year statutory time limit under the ACL.

If Australia were to ratify the Athens Convention, all claims for the recovery of damages for death and personal injury of a passenger, as well as loss or damage to the passenger's luggage, sustained during the course of international carriage, would need to be brought in accordance with the Athens Convention. This means

that passengers would no longer be able to bring such claims against Shipowners/Carriers under the ACL, contract law or negligence.

5.2 Implementation

If Australia ratifies the Athens Convention, it is expected that domestic legislation similar to the CACL Act (the legislation that implements the Montreal Convention), would need to be developed.

As outlined above, the Athens Convention allows a degree of flexibility to Member States in implementing the convention, in particular, in relation to defining the limitation of liability limits.

Australia is currently a party to the LLMC Convention which provides a ‘global liability limit’ to a ship whereas the Athens Convention applies a ‘per passenger limit’. The global liability limit under the LLMC Convention is set at 175,000 SDR multiplied by the ship’s certified capacity and the per passenger liability limit under Athens is 250,000 SDR. As such, depending on the size of the ship and the number of passengers it is authorised to carry, compensation for passengers under the Athens Convention could, if the LLMC Convention limit did not apply, be significantly higher than what is currently permitted under the LLMC Convention.

As outlined above, the Athens Convention and the LLMC Convention enable governments to decide whether to limit Carrier’s liability for personal injury and death under either or both of the Conventions.

As such, if Australia were to ratify the Athens Convention, there are a number of potential options for limiting liability:

- (1) Maintain the global liability limit under the LLMC Convention while adopting the liability caps for personal injury and death claims under the Athens Convention (i.e. implement both liability regimes).
- (2) Choose to retain the global limits under the LLMC Convention and opt out of the liability limits in Athens. This would not affect the application of other protections conferred under the Athens Convention such as the compulsory insurance provisions.

- (3) Enact the Athens Convention passenger limitation of liability limits in full and renounce the LLMC global liability limits in respect of personal injury and death claims.
- (4) Renounce the LLMC Convention global liability limits in respect of personal injury and death claims and set higher liability limits under the Athens Convention (potentially unlimited liability).

Appendix A: Questions to assist in framing submissions

The purpose of this discussion paper is to determine the adequacy of the current legal framework regarding the international carriage of passengers by sea and in particular, the compensation and liability regime for these passengers. Additionally, Infrastructure is seeking views on the commercial implications if Australia were to ratify to the Athens Convention. These views will assist the Australian Government in its consideration of whether ratification of the Athens Convention is appropriate.

Whilst the Australian Government is currently focusing on the possible ratification of the Athens Convention which relates to international carriage, we also welcome your views on the potential to extend the same regime to domestic carriage in the future.

When formulating a response to this discussion paper, it would be helpful if specific consideration could be given to the following:

(1) Do you think the Australian Government should ratify the Athens Convention?

What are your reasons for this view? Where possible, please provide reference to the costs, impacts and benefits associated with the possible implementation of the Athens Convention.

(2) If Australia were to ratify the Athens Convention, which of the options listed in paragraph 5.2 of this paper do you consider would be most appropriate and why?

(3) Do you have any other comments or are there any other issues that you consider are relevant to Infrastructure's consideration of the potential ratification of the Athens Convention?